Reserved Judgment

THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Second Appeal No. 196 of 2001
Old Second Appeal No. 1003 of 1998

1. The State of U.P. through Executive Engineer, Temporary Division, P.W.D. Bageshwar, which has now been Designated as Provincial Division P.W.D. Bageshwar.
2. The Executive Engineer, Construction Division, P.W.D. Bageshwar, which has now been merged with Provincial Division P.W.D. Bageshwar.
(Defendants)

…Appellants.

Versus.

Sri Sukha Nand Jain,
102, Arvindpuri, Meerut.
(Plaintiff)

… Respondent.

Sri Nand Prasad, learned Standing Counsel for the State-appellants.
Sri Sudhir Kumar, learned counsel for the respondent.

Date June 20, 2006.

Hon. B.S. Verma, J.

This Second Appeal has been preferred against the judgment and decree dated 15-4-1998 by the then learned District Judge Almora in Civil Appeal No. 13 of 1996, Executive Engineer Temporary Division P.W.D. Bageshwar and another Vs. Sukha Nand Jain, arising out of Original Suit No. 2 of 1987, S.N.Jain Vs. Executive Engineer and another, whereby the appeal preferred by the defendant-appellant was dismissed by the learned District Judge. It may be mentioned that the Original Suit No. 2 of 1987 filed by the plaintiff-respondent Sukhanand Jain for permanent injunction against the defendant-appellants was decreed by judgment and decree dated 10-3-1989 passed by the Civil Judge Almora.

Relevant facts giving rise to the present second appeal are that the plaintiff-respondent filed Original Suit No. 2 of 1987, against the defendants, in the Court of Civil Judge (Now Senior

Division) Almora, for permanent injunction restraining the defendants form recovering the cost of certain items of tools and plants with the allegation that plaintiff has been a contractor for construction of steel bridges in Kumaun Zone and a number of bridges were erected under various contracts executed with the defendants. During execution of a contractual work, plaintiff had taken as per terms and conditions of the contract bond, items of bridges, which were returnable. It was further alleged by the bridges, which were returnable. It was further alleged by the plaintiff-respondent that at the relevant period, Sri R.K.Jain, Executive Engineer was having charge of two divisions of the Public Works Department including the construction division Bageshwar. In the month of December, 1983, the defendant no. 1 required items of Tools and Plants and therefore, the plaintiff was directed to provide them to the staff of the defendant no.1. Since the orders of Sri R.K.Jain was binding on the plaintiff, he accordingly handed over some Tools and Plants to the employees as desired. According to the plaintiff the articles supplied by the defendant no.2 as Tools and Plants were reduced in writing. The articles handed over to defendant no.1 were not returned to defendant no.2 and this caused shortage in Tools and Plants supplied by the plaintiff. It was further said that the Junior Engineer of the defendant no.1 Sri Rastogi appears to have delivered some Tools and Plants to another contractor Dham Singh, who was executing a construction work under the Provincial Division P.W.D. Ranikhet. The plaintiff contended that he was not liable for the Tools and Plants which had fallen short to the extent supplied by defendant no.2. According to the plaintiff, the entire Tools and Plants were returned to defendant no.1 as per direction of the defendant no.2. The plaintiff came with the suit for permanent injunction apprehending unwarranted recovery with respect to Tools and Plants.

The defendants contested the suit by filing written statement asserting therein that the plaintiff did not complete the contract work undertaken by him from the defendants. It was

pleaded that the plaintiff had taken some Tools and Plants from the defendant no.2. The plaintiff left out the contract work, therefore, the work was got executed departmentally for erection of Harshila bridge and for this purpose, some tools and plants were taken from the plaintiff as well as another contractor Dham Singh. The tools and plants taken from the plaintiff were returned to him, but the plaintiff in turn did not return them to the defendant no.2. It was also stated that if the employees of defendant no.1 did not return the Tolls and Plants, the plaintiff himself was liable fro the same. The defendant no.2 is taking steps for recovery of the costs of Tolls and Plants.

On the pleadings of the parties, necessary issue were framed by the trial court. The evidence led by the parties was categorical finding that the defendant no.1 had wrongly supplied some Tools and Plants to Dham Singh, which were taken by the plaintiff. It was also concluded that the defendant no.1 did not return the entire tools and plants to the plaintiff and accordingly, the suit of the plaintiff was decreed vide judgment and decree dated 10-3-1989. Aggrieved by the said judgment and decree, the appellants preferred appeal before the District Judge, which was registered as Civil Appeal No. 13 of 1996. The appellate court after reappraisal of the entire evidence came to the conclusion that there was no merit in the appeal and accordingly dismissed the appeal vide judgment and decree dated 15.4.1998.

The second appeal was admitted by this Court on 31.3.2006 the question of law to the effect whether the learned courts below have committed illegality in shifting the burden of proof on the defendants instead of on the plaintiff-respondent, if so, its effect?

I have heard learned Standing Counsel, Sri Nand Prasad, for the appellants as well as Sri Sudhir Kumar, learned counsel for the respondents.

To answer the above question of law, it is necessary to mention the admitted facts of the case at the very outset. It is admitted between the parties that the plaintiff-respondent was a contractor, who had undertaken contract work from the defendants. It is admitted case between the parties that the plaintiff took some Tools is and Plants from the defendant no.2 and Sri R.K.Jain was the Executive Engineer, who was In-charge of two Divisions of the Public Works Department at Bageshwar in December, 1983. It is admitted to the defendants that the plaintiff left out the contract work of Harshila bridge unfinished, which was ultimately got completed by the Department through its own agency and for this purpose, some Tools and Plants were taken from the plaintiff under the directions of the Executive Engineer Sri R.K.jain and some were taken from another contractor Dham Singh. It has been clearly admitted by the defendants in their written statement that to complete the contract work, the department did take some Tools and Plants from the plaintiff, but it was stated that the same were returned to the plaintiff.

The crux of the case is that according to the defendants, there was documentary evidence regarding supply of Tools and Plants by the defendant no.2 to the plaintiff, but it is surprising that despite their own admission they did not choose to file the documents to substantiate their contention as to what items of Tools and plants were issued in the name of the plaintiff. On the other hand, the plaintiff had filed paper no. 5 Kha annexed to the plaint showing that some Tools and Plants were returned by the defendant to the plaintiff. This document bears signatures of the plaintiff as well as Junior Engineer concerned of the P.W.D. The plaintiff to substantiate his contention moved application for the better particulars from the defendants and also moved an application for

production of documents by the defendants but the defendant did not furnish full details of the facts, which could indicate that the plaintiff had defaulted in the return of the Tools and Plants issued to him. Since the defendants clearly mentioned in the written statement in Paragraph 7 that the Tools and Plants received by the plaintiff were brought on the record of office of the defendant no.2. Once it was admitted by the defendants that the record of subject matter of the suit was available with the defendant, the burden to prove the fact shifts from the plaintiff and rests with the defendants to establish its stand before the court, particularly on the face of the applications moved by the plaintiff during the course of proceedings as mentioned above. Both the courts below have recorded categorical finding of fact that the defendant did not return the entire Tools and Plants to the plaintiff except that mentioned in paper no. 5-Kha. There is own admission of the defendants that defendant no. 1 had taken some Tools and Plants from the plaintiff.

It is further pertinent to mention that in paragraph no. 7 of the written statement, the defendants have impliedly raised a counter-claim that the plaintiff was responsible to return the Tools and Plants taken by him to the defendant no.2, but the record shows that the defendants failed to substantiate its stand before the courts below. On the one hand, the defendants in the written statement had intended that they will proceed to recover the cost of the Tools and Plants falling short on the part of the plaintiff from him, but at the same time they did not produce any such document before the court to show bona fide on their part. When according to the defendants, a record was available in the office of the defendant no.2 regarding the inventory of the tools and plants issued to the plaintiff, the burden of proof shifted upon the defendants. The appellate court rightly observed that even the store-keeper of the Department, who could be the best witness to establish the default on the part of the plaintiff in the matter of return of tools and plants, was not produced either in the trial court or in the first appellate court.

In view of the discussion aforesaid, the question is accordingly answered in the negative against the appellants. The appeal is liable to be dismissed.

The appeal is dismissed. The judgment and decree, under appeal, is upheld. In the circumstances of the case, no order as to costs.

(B.S.Verma, J.)

RCP